Supreme Court, U. S.
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No. 80-493

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES DEPARTMENT OF EDUCATION,
PETITIONER

v.

SEATTLE UNIVERSITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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TABLE OF AUTHORITIES

Cases:	Page
Andrus v. *Idaho*, 445 U.S. 715	5
Gunther v. *County of Washington*, 602 F.2d 882, cert. granted, No. 80-429 (Nov. 3, 1980)	2
North Haven Board of Education v. *Hufstedler*, Nos. 79-6136, 79-6247, 79-7747 (2d Cir. July 24, 1980)	1
Powell v. *McCormack*, 395 U.S. 486	5
Statutes and regulations:	
Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e-2(a)(1)	2
Department of Education Organization Act, Pub. L. No. 96-88, Section 505(d), 93 Stat. 691 (to be codified at 20 U.S.C. 3505)	3
Education Amendments of 1972, Title IX, 20 U.S.C. 1681 *et seq.*	3
34 C.F.R. 100.7(a)	3
34 C.F.R. 100.7(c)	3
34 C.F.R. 106.51-106.61	3, 4
45 C.F.R. 86.51-86.61	3
Miscellaneous:	
Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965)	2
45 Fed. Reg. 30802 (1980)	3

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1. On October 24, 1980, the United States Court of Appeals for the Second Circuit denied the petition for rehearing in *North Haven Board of Education* v. *Hufstedler*, Nos. 79-6136, 79-6247, 79-7747 (July 24, 1980). Accordingly, the conflict in the circuits on the question presented by our petition is no longer uncertain.

2. Respondent contends (Resp. Br. 4-7) that this case has been rendered moot by the Office of Federal Contract Compliance Programs' issuance, on July 11,

1980, of a "Notification of Results of Investigation" stating that there was insufficient evidence to conclude that Seattle University had violated its obligations under the nondiscrimination and affirmative action provisions of Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965), as amended. There is no merit to this contention.

Even assuming for the sake of argument that the Department of Education ("the Department") is bound by the results of the OFCCP investigation into sex discrimination by Seattle University with respect to faculty salaries in the School of Nursing,[1] a live case or controversy remains.

In order to assure that educational institutions receiving federal aid abide by the nondiscrimination

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[1] The negative findings in the "Notification" issued by the OFCCP of the Department of Labor are predicated on the apparent assumptions (1) that discrimination on the basis of sex with respect to the salaries of the instructors in respondent's School of Nursing can be shown only if there are sex-based discrepancies in salaries paid the instructors *within* that school and (2) that the absence of male faculty members in that school thus precludes any comparison of salaries for the purpose of determining if respondent is discriminating on the basis of sex (App. B, *infra*, 4a-5a). But as the court of appeals in *Gunther* v. *County of Washington*, 602 F.2d 882 (9th Cir. 1979), cert. granted, No. 80-429 (Nov. 3, 1980), has held, the sex discrimination provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), prohibits discrimination on the basis of sex among employees holding "comparable," although not "substantially equal," jobs. 602 F.2d at 888-891. The Department believes this correctly states the standard under Title IX, so that a failure to determine whether faculty positions elsewhere in the University are comparable to those in the School of Nursing necessarily renders the investigation inadequate for purposes of Title IX.

requirements of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, the Department has provided by regulation for the conduct of periodic compliance reviews (34 C.F.R. 100.7(a)) and for investigations where such reviews indicate "a possible failure to comply" with its nondiscrimination regulations issued under Title IX (34 C.F.R. 100.7(c)).[2] Under the judgment entered in this case (App. A, *infra*, 2a), the Department's employment discrimination regulations (34 C.F.R. 106.51-106.61) are declared invalid[3] and the Department is enjoined not only from pursuing the complaint that triggered the investigation giving rise to this litigation, but also from

> engaging in *any* investigation of Seattle University pursuant to any complaint filed with the defendant alleging discrimination against any employee of the University under Title IX, § 901 *et seq.*, the Education Amendments of 1972, 20 U.S.C. § 1681 et *seq.*, and regulations adopted by defendant pursuant thereto, 45 C.F.R. Subpart E, §§ 86.51-61; from *making or attempting to make any finding that Seattle University*

[2] The Department of Education's regulations (34 C.F.R.) are published at 45 Fed. Reg. 30802 (1980).

[3] These are the counterparts of 45 C.F.R. 86.51-86.61, the Title IX employment practices regulations issued by the Department of Health, Education, and Welfare (HEW), which were in effect when this litigation began. Pursuant to Section 505(d) and (e) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 691 (to be codified at 20 U.S.C. 3505), the Department of Education was automatically substituted for HEW in this suit. The judgment invalidating the HEW regulations and enjoining their enforcement accordingly applies to the Department of Education and its counterpart regulations.

> *is in noncompliance with said regulations;* from terminating or refusing to grant or attempting to terminate or refuse to grant federal financial assistance to Seattle University for any alleged noncompliance with said regulations; and from failing to duly and normally process Seattle University's applications for federal financial assistance * * *. [Emphasis added.]

The Department is therefore effectively barred from conducting compliance reviews to assure that respondent, as a federal aid recipient subject to Title IX, is complying with all of the regulations promulgated to enforce that statute. Whether or not the particular complaint that spawned this litigation remains at issue, a controversy exists between the parties as to the Department's authority to conduct its continuing review function with respect to sex discrimination in employment. If the regulations now promulgated at 34 C.F.R. 106.51-106.61 are valid, as the Department contends, then its compliance reviews may include reviews of respondent's employment practices; if those regulations are invalid, then the compliance reviews must be limited accordingly. The parties thus possess "a legally cognizable interest in the outcome" of this case, and it accordingly is not moot. *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969). See also *Andrus* v. *Idaho*, 445 U.S. 715, 722-725 (1980).

For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1980